APR 15 2003

No. 02-1354

IN THE

Supreme Court of the United States

VERONICA MOODY JOHNSON and
CHRISTOPHER LEE JOHNSON,

Petitioners,

v.

CITY OF CHESAPEAKE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case arises out of local zoning matter. In 1997 or 1998, the Petitioners began construction of a brick fence on their property at 1142 Masters Row, Chesapeake, Virginia. They did not have a building permit. In September 1998, the Department of Inspections for the City of Chesapeake ordered the Petitioners to cease construction due to the failure to obtain an authorizing building permit, and they were told they would have to seek a special exception from the zoning ordinance for those portions of the fence that exceeded four feet in height. The Johnsons filed an application with the City Department of Planning, but because adjacent property owners objected to the construction of the fence, the zoning administrator was without authority to issue the permit. The Johnsons therefore were required to seek a special exception to the zoning ordinance's height restrictions from the Planning Commission of the City of Chesapeake.

On January 27, 1999, the Planning Commission heard testimony and argument with respect to the Petitioners' application. When the Commission voted on the application, it resulted in a 4-4 tie. The matter was continued until February 24, 1999, when the full nine-member Commission could consider the matter. Additional testimony and argument was heard at that time, and the Commission voted 7-2 to deny the application. The Johnsons appealed the decision to the City Council, where it was denied.

On May 19, 1999, Petitioner Veronica Moody Johnson (Mrs. Johnson) filed a suit, *pro se*, in the Circuit Court of the City of Chesapeake, asserting various statutory and constitutional claims arising out of the denial of the Petitioners' application. This claim was dismissed on August 23, 1999.

Also on May 19, 1999, Petitioner Mrs. Johnson filed a complaint in federal court which was virtually identical to that filed in state court. The lower court dismissed the suit without prejudice based upon the Burford abstention doctrine. On appeal, the Fourth Circuit affirmed the dismissal of the equitable claims, but reversed and remanded with respect to the court's dismissal of Mrs. Johnson's claims for money damages. In response, the lower court stayed the claims for monetary damages pending resolution of the state court matter.

After the dismissal of her state case, Mrs. Johnson filed a motion in the federal district court to reopen the stayed federal suit, which was granted on October 4, 2000. The Respondents filed a Motion to Join a Necessary Party, seeking an Order requiring Mrs. Johnson to join her husband, Christopher Lee Johnson, as a party Petitioner, on the ground that the property in question was owned by the Johnsons as tenants by the entirety, and because they had both filed the application for the special exception. This was granted, and the Johnsons filed an Amended Complaint on June 5, 2001.

The Amended Complaint contained the following claims: (1) violation of the federal Fair Housing Act, 42 U.S.C. § 3601, *et seq.*; (2) conspiracy to deprive civil rights; (3) violation of the Civil Rights Act of 1866; (4) violation of 42 U.S.C. § 1981; (5) violation of 42 U.S.C. § 1982; (6) violation of the Equal Protection Clause of the Fourteenth Amendment, which was construed by the court to be brought pursuant to 42 U.S.C. § 1983; (7) violation of the Due Process Clause of the Fourteenth Amendment; (8) intentional infliction of emotional distress; and (9) loss of consortium.

The Respondents filed a Motion to Dismiss the Amended Complaint for failure to state a claim. On August 10, 2001, the court dismissed all of the Petitioners' claims with the exception of those for violation of 42 U.S.C. § 1981, equal protection, and punitive damages based upon the Petitioners' allegations of racial discrimination. This order was appealed by the Petitioners, but was dismissed by the Fourth Circuit on September 28, 2001, on the Petitioners' motion.

The Respondents filed a Motion for Summary Judgment on December 6, 2001, as to the remaining claims. This was granted on March 11, 2002, after extensive discovery by the Plaintiffs.

The Petitioners appealed in the United States Court of Appeals for the Fourth Circuit, which reviewed the record and found no reversible error. The Petitioners then petitioned the court for rehearing and rehearing *en banc*. These were denied by order filed December 16, 2002.

At various points in their brief, the Petitioners confusingly refer to the Emerald Greens Property Owners Association and Board of Directors. *See, e.g.*, Pet. for Writ of Cert. p. 10. The property at issue is located within a subdivision named Emerald Greens. The Petitioners filed a separate suit against certain Emerald Green defendants about the same fence which was appealed to this Court. (Case No. 02-694) This Court denied the Johnsons' Petition for Writ of Certiorari in that case on January 13, 2003, and rehearing was denied on March 3, 2003. Although the Petitioners refer to Case No. 02-694 as a companion case, it is a separate suit. Emerald Greens is not a party to the present matter and the Petitioners' allegations concerning the homeowners association and board should not be imputed to the present Respondents.

SUMMARY OF THE ARGUMENT

The Petitioners' Petition for Writ of Certiorari should be denied. First, one of the questions presented (vagueness) was not raised in the courts below. Second, the Petitioners misunderstand the standards on appeal and appear to be asserting new claims against the trial judge which are not properly before the court. Third, this case is not of the character which is of interest to the court under Rule 10 of the Supreme Court of the United States. To the extent that the Petitioners allege the trial court erred in granting summary judgment, the asserted error consists of factual findings, for which a writ is rarely granted. Lastly, the trial court properly granted the Summary Motion for Judgment because the Petitioners failed to present evidence of the elements of their asserted claims.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS' CLAIM THAT SECTION 14-201(B) OF THE CODE OF THE CITY OF CHESAPEAKE IS UNCONSTITUTIONALLY VAGUE IS NOT PROPERLY BEFORE THE COURT FOR REVIEW.

The Petitioners claim that § 14-201(B) Code of the City of Chesapeake is unconstitutionally vague. This claim is raised for the first time in their Petition for Writ of Certiorari. It was not raised in the courts below and therefore is not properly before the court for review. In their amended complaint, actually entitled "Amended Bill of Complaint for Declaratory Judgment and Injunction and Damages", paragraph 1, the Petitioners clearly describe the nature of their claims:

> This is an action for declaratory judgment, permanent injunctive relief, and damages for discrimination on the basis of race in the granting

> of housing related privileges in a zoning decision. This action arises under the Federal Fair Housing Act of 1968, as amended, 42 U.S.C. § 3601, *et seq.* and the Civil Rights Acts of 1866, 42 U.S.C. § 1981 and 1982, and the Fourth Amendment of the United States Constitution.

In addition, Count 2 of the Amended Bill of Complaint added a conspiracy claim. The lower court enumerated the causes of action asserted by the Johnsons in their amended complaint. Pet. for Writ of Cert. App.-60. The Petitioners did not plead a vagueness claim in their Amended Bill of Complaint, and did not assert it in the courts below. The vagueness issue is not properly before this Court and should not be considered. *See United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980).

II. THE DECISION BELOW DOES NOT PRESENT A CONFLICT.

The Petitioners erroneously invoke 28 U.S.C.A. § 1257 and Rule 10(b) of the Rules of the Supreme Court of the United States, representing that a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. As the record reflects, this case was decided within the federal system so that the cited section and rule cited do not apply.

The Petitioners have not shown that the decision rendered by the Fourth Circuit conflicts with a decision of any other court, much less on some important matter or important federal question. Instead, the Petitioners are seeking a review of the evidence. However, this Court "do[es] not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Rule 10 of the Rules of the United States Supreme Court states that a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The Petitioners merely seek a review of what they consider to be erroneous factual findings. Therefore their Petition should be denied.

III. SUMMARY JUDGMENT WAS PROPERLY GRANTED.

The Petitioners claim that the grant of summary judgment denied them their constitutional right to a jury trial. In fact, they appear to be attempting to assert new claims directly against the trial court for violation of their constitutional rights. *See, e.g.*, Questions Presented No. 2 "Whether or not the District Court's refusal to grant petitioners' demand for a jury trial. . . . is a violation of the 5th, 7th and 14th Amendments to the [U.S.] Constitution." Pet. for Writ of Cert. p. i.

To the extent that the Petitioners assert that the district court erred in granting summary judgment, the record reflects that summary judgment was warranted. Summary judgment under FED. R. CIV. P. 56 is appropriate when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead set forth specific facts illustrating genuine issues for trial. *Id.*

The opinion of March 11, 2002 reflects that the court used the proper standard for summary judgment and viewed the evidence in the light most favorable to the Petitioners. *See* Pet. for Writ of Cert. App. 18-23. The lower court properly dismissed the Petitioners' two remaining claims (equal protection and 42 U.S.C. § 1981), on the grounds that the Petitioners had not produced evidence in support of the elements of their claims. *See* Pet. for Writ of Cert. App. 40-41. The issue on appeal is whether there was a genuine issue of material fact to be decided by the finder of fact. *See, e.g., Celotex Corp.*, 477 U.S. at 322-24.

The Petitioners list 21 evidentiary exhibits and 17 depositions attached to their amended complaint. The written opinion dated March 11, 2002 evidences that the Petitioners' voluminous exhibits and deposition transcripts were reviewed by the district judge and found not to support their claims. Instead, the court found testimony which was damaging to the Petitioners, some of which was not even considered. Pet. for Writ of Cert. App. 28-29, App. 29 n.1.

One of the prongs of an equal protection claim under the Fourteenth Amendment is that the state has created a classification that singles out a group of individuals. *See Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 818-19 (4th Cir. 1995). The Petitioner has the burden of proof on this issue. One factor that evidences discriminatory intent is a consistent pattern of similar actions. *Parents, Alumni & Friends of Taylor School v. City of Norfolk*, 37 F. Supp. 2d 435, 444 (E.D. Va. 1999). Although this was alleged by the Petitioners in their Amended Complaint, they produced no evidence in support of this allegation. Pet. for Writ of Cert. App. 28. In contrast, the Respondents submitted the deposition testimony of the

Petitioners in which they admit that their claim is based on discrimination against them, rather than any evidence of a pattern or practice of racial discrimination by the Respondents. Pet. for Writ of Cert. App. 31. Mrs. Johnson attached a list of special exception zoning decisions to the Amended Complaint, but had no evidence concerning the race of the applicants, or whether the applications for special exception were contested. Pet. for Writ of Cert. App. 30-31. In addition, Mrs. Johnson could not, at the time of her deposition, cite any statements made by the City decision makers which were based on racial animus. Pet. for Writ of Cert. App. 30. Further, the individual Respondents submitted affidavits stating that their decision was not based upon racial animus. The Petitioners' current allegation that there **was** a pattern or practice of racial discrimination was contradicted by their own prior testimony, and most importantly, was not supported by any evidence presented to the trial judge in considering the Respondents' Motion for Summary Judgment. Pet. for Writ of Cert. App. 38. Nor did they present other evidence of improper, intentional discrimination. Pet. for Writ of Cert. App. 38.

Likewise, the court found insufficient evidence to support a claim for violation of 42 U.S.C. § 1981.[1] Whereas the Petitioners alleged they were members of a racial minority and that the Respondents had intentionally discriminated on the basis of race, they produced no evidence of intentional discrimination. Pet. for Writ of Cert. App. 39-40.

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1. All persons with the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to he full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .

42 U.S.C. § 1981(a).

The Petitioners discuss the actions and testimony given by their neighbors and the neighborhood property owners association and others at the zoning hearing, and discuss their races, as well as questioning their motives for objecting to her application: however, the motives of her neighbors are irrelevant to the present matter. Instead, what is relevant is whether the Petitioners raised a genuine issue of material fact to prove elements of claims for equal protection and 42 U.S.C. § 1981 against the present Respondents. They did not do so and summary judgment was properly granted.

IV. THE PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM WAS PROPERLY DISMISSED.

The Petitioners repeatedly refer to the "arbitrary and capricious" standard. *See*, *e.g.*, Petitioners' Reasons for Granting the Writ, Pet. for Writ of Cert., p iv-v, reasons 2 and 4. The standard of "arbitrary and capricious" is utilized in evaluating substantive due process claims under the Fourteenth Amendment. *See Marks v. City Council of the City of Chesapeake, Virginia*, 723 F. Supp. 1155, 1160 (E.D. Va. 1988). Here, the Petitioners' substantive due process claim was dismissed on the Respondents' FED. R. CIV. P. 12(b)(6) motion by Order dated August 10, 2001. *See* Pet. for Writ of Cert. pp. 78-86. The issue on appeal therefore would be whether the lower court properly dismissed their substantive due process claim pursuant to FED. R. CIV. P. 12(b)(6).

There are three elements for a substantive due process claim under the Fourteenth Amendment. These are that: (1) the Petitioners must have a property interest; (2) that the Respondents deprived the Petitioners of their property interest; and (3) that "the state's action falls so far beyond

the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Sylvia Development Corp. v. Calvert City, Md.*, 48 F.3d 810, 827 (4th Cir. 1995). In its written opinion dated August 10, 2001, the district court did not even reach the question of whether the denial of the special exception application was arbitrary and capricious under the third prong. Instead, it held that the Petitioners' must first establish that: (1) they have a vested property interest; (2) which was deprived by the Respondents. Pet. for Writ of Cert. App. 80-84. The court found that the Petitioners did not possess a property interest in the requested special exception because the ordinance clearly conferred upon the Planning Commission and City Council significant discretion as to whether to grant or deny the exception. *Id.* at App. 82-83. While they repeatedly allege that the denial of their special exception was "arbitrary and capricious," the Petitioners do not squarely address the actual basis of the trial court's dismissal of their claim — that they did not have a vested property interest upon which to base a substantive due process claim. The Petitioners therefore provide no basis for finding error in the trial court, and their Petition should be denied.

To the extent the Petitioners seek federal court review of the state zoning decision in the nature of an appeal of allegedly arbitrary and capricious conduct, they are in the wrong forum. The Petitioners had available a recourse in the form of an appeal to the Circuit Court of the City of Chesapeake, but this was only pursued by Petitioner Mrs. Johnson. This case was ultimately abandoned. *See* Pet. for Writ of Cert. at App. 58-59.

V. THERE IS NO STATUTORY MANDATE THAT THIS MATTER BE GRANTED CERTIORARI.

The Petitioners make the bold allegation, without argument or citation, that because they are African-Americans, they have the statutory right to an appeal to this court, pursuant to the Civil Rights Act of 1866. As this court is well aware, "[r]eview on a Writ of Certiorari is not a matter of right, but of judicial discretion." Rule 10 of the Rules of the Supreme Court of the United States. This act provides no basis for granting the petition.

CONCLUSION

Summary judgment was properly granted by the trial court in this matter. For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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